KONG PENG PEW & ORS

v.

MERU VALLEY RESORT BHD

HIGH COURT MALAYA, IPOH
BALIA YUSOF JC
[CIVIL SUIT NO: 22-192-2001]
20 MAY 2003

CIVIL PROCEDURE: *Injunction - Interlocutory mandatory injunction - Whether grant of interlocutory mandatory injunction ought to be for unusually sharp and clear cases - Cutting off of water supply - Whether act complained of was unlawful and should be restrained*

CIVIL PROCEDURE: *Injunction - Order of injunction - Application for - Cutting off of water supply - Whether act complained of was unlawful and should be restrained*

The plaintiff bought houses from the defendant, a development company. By a sales and purchase agreement, it was agreed amongst others that the defendant as vendor would provide all the necessary water, electricity and the sewerage mains. However, the defendant subsequently imposed maintenance charges on the plaintiffs for certain maintenance services. Disputes arose between the plaintiffs and the defendant over the imposition of these maintenance charges, resulting in the defendant cutting off the water supply to the plaintiffs' houses. This prompted the plaintiffs to file an action against the defendant over the dispute on the said maintenance charges. Pending the disposal of that action, the plaintiffs sought the following relief: (i) an interlocutory injunction directing the defendant to connect water supply to all the plaintiffs' premises; and (ii) an injunction to restrain the defendant from disconnecting the water supply to all the plaintiffs' premises. The issue in this instance revolved mainly on the legality of the defendant's action in cutting off the water supply to the plaintiffs' premises.

Held:

[1] The grant of an interlocutory mandatory injunction demands a higher standard than the test stated in the *American Cynamid* case. The plaintiff must show an unusually sharp and clear case. (p 396 a)

[2] On a perusal of cl.16 of the agreement, although it is worded in such a way as to be non-exclusive as regards the services to be provided by the defendant, the supply of water was not intended to come within that clause. Thus, there was no legitimate reason for the defendant to take it up as an issue and force it on the plaintiffs. (p 396 f-h)

[3] The plaintiffs had demonstrated an unusually sharp and clear case and that the act complained of was unlawful and ought to be restrained. The hardship endured by the plaintiffs and the inconvenience caused to them far outweighed the difficulty of the defendant in complying with the mandatory order of restoring the water supply to the plaintiffs. The risk of injustice caused to the plaintiffs was greater if their application was refused and as such, their application was considered even though there was no high degree of assurance about the plaintiffs' chances in establishing their rights. (pp 397 h & 398 a)

[Application allowed.]

Case(s) referred to:

Bandaraya Development Bhd v. Ang Yoke Lin Construction Sdn Bhd [1993] 2 CLJ 52 HC ***(refd)***

Bank Islam Malaysia Bhd v. Tinta Press Sdn Bhd & Ors [1986] 1 MLJ 256 ***(refd)***

Gibb & Co v. Malaysia Building Society Bhd [1982] 1 MLJ 271

H & R Johnson (Malaysia) Bhd v. H & R Johnson Tiles Ltd & Anor [1995] 2 CLJ 581 HC ***(refd)***

Leisure Data v. Bell [1988] FSR 367 ***(refd)***

MBf Holdings Bhd v. East Asiatic Company (Malaysia) Bhd [1995] 4 CLJ 73 HC ***(foll)***

Shamsudin Shaik Jamaludin v. Kenwood Electronics Technologies (M) Sdn Bhd [1999] 8 CLJ 544 HC ***(refd)***

Shepherd Homes Ltd v. Sandham [1971] Ch 340 ***(refd)***

Wah Loong (Jelapang) Tin Mine Sdn Bhd v. Chia Ngan Yiok [1975] 2 MLJ 109 ***(refd)***

Other source(s) referred to:

Equitable Remedies, 4th edn, p 480

For the plaintif - GS Yap (Zulkifli); M/s Miranda, How Zul & Low)
For the defendant - R Jegatheesa; M/s RJ Esa & Co

[The defendant has appealed to the Court of Appeal vide Civil Appeal No: A-02-201-2003]

Reported by Raja Vishnu Sivarajah

JUDGMENT

Balia Yusof JC

The plaintiffs filed an application seeking for the following relief namely:

(a) an interlocutory injunction directing the defendant and/or their agents and or their servants to connect the water supply to all the plaintiffs' premises;

(b) an injunction to restrain the defendant and/or their agents and/or their servants from disconnecting the water supply to all the plaintiffs' premises;

(c) costs and such other reliefs as deem fit by this court.

The plaintiffs bought houses from the defendant, a development company, established under the Companies Act 1965 who is the developer of the housing scheme called Golfview Terrace in Ipoh. The tenth plaintiff, Lee Mau Joo subsequently withdrew from the action. By a sale and purchase agreement signed between the plaintiffs and the defendant at various dates it was agreed amongst others that the defendant as vendor shall provide all the necessary water, electricity and sewerage mains. Clause 17 of the said agreement provides for the obligation of the defendants in respect of this subject matter and for convenience it would be necessary for me to quote the said cl. 17 in *toto* which provides as follows:

17. Water, Electricity, Gas Piping, Telephone Trucking.

(1) The vendor shall at its own cost and expense lay or cause to be laid all necessary water, electricity and sewerage mains, gas piping (if any) and internal telephone trucking and cabling (if any), to serve the said Building and at its own cost and expense undertake to apply for the connection of the internal water, electricity, sanitary and gas installation (if any) of the said Building to the water, electricity and sewerage mains of the Appropriate Authority, and the gas mains of the relevant authority.

(2) The Purchaser shall be liable for and shall pay, within fourteen (14) days after the receipt of a notice requesting for the payment from the vendor, the deposits for installation of water, electricity and gas meters and the Vendor shall bear all other cost, if any.

(3) The Purchaser may apply for telephone service and shall be liable for and shall pay the deposit for such service.

To date it is alleged by the plaintiffs that the defendant has still not made the internal connections for the supply of water with the relevant authority, in this case the Lembaga Air Perak and instead water is supplied to the plaintiffs'

premises from the defendant's source. The defendant subsequently imposed maintenance charges on the plaintiffs for maintenance services listed in exh. KPP4 of the plaintiffs' affidavit in encl. 3 which lists the following services to be provided to the plaintiffs namely; security services, clearing of common drains, clearing of common areas and garbage collection, grass cutting and street lighting. All these services together with the cost for staff maintenance total up to RM120 per month per unit of household in the said housing project. Disputes arose between the plaintiffs and the defendant over the imposition of this maintenance charges/services resulting in the defendant cutting off the water supply to the plaintiffs' houses prompting the plaintiffs to file an action against the defendant over the dispute on the said maintenance charges/services. Pending the disposal of that action the plaintiffs now seek the reliefs as stated in the earlier part of this judgment.

It is contended by the plaintiffs that by the provisions of cl. 14, 16 and 17 of the agreements, it is the obligations of the defendant to provide for the infrastructure and the services and that the defendant has no right to cut the water supply to their premises. The plaintiffs further contend that cl. 16 of the said agreement which provides for maintenance services does not include the supply of water as one of the items envisaged by the said clause. The said cl. 16 provides as follows:

16. Maintenance of Services

> The vendor shall provide services, including refuse collection, cleaning of public drains and grass cutting on the road reserves, as from the date of handing over of vacant possession until the same are taken over by the Appropriate Authority but until they are so taken over the Purchaser shall, from the date he takes vacant possession of the said property, contribute from time to time a fair and justifiable proportion of the cost and expense of such services, such apportionment to be made by a quantity surveyor appointed by the Vendor.

Prior to the cutting off of the water supply to the plaintiffs' premises, the plaintiffs has all along paid for the water supply to the defendant as evidenced from exh. "KPP9 and KPP10" in encl. 3 and is still willing to do so but was refused by the defendant. The said exh. "KPP9" clearly shows that the supply of water is separately itemised and does not form part of the maintenance fee. From this narration of facts, it is contended by the plaintiffs that the action of the defendant in cutting off the water supply is unjustified, unwarranted and illegal. They are now seeking redress from this court for their rights to be supplied with water to be restored by way of the mandatory injunction which is being sought for.

It is trite law that the grant of interlocutory mandatory injunction demands a higher standard than the test stated in the *American Cynamid* case. The plaintiff must show an unusually sharp and clear case. In *MBF Holdings Bhd v. East Asiatic Company (Malaysia) Bhd* [1995] 4 CLJ 73, KC Vohrah J at p. 76 stated:

> The ordinary *American Cynamid* principles are not applicable in an application for a mandatory injunction. In the case of a mandatory interlocutory injunction for its grant there must be a high degree of assurance that at the trial it will appear that the injunction was rightly granted (*Shepherd Homes Ltd v. Sadham* [1971] Ch 340; *Locabail International France Ltd v. Aqroexport* [1986] 1 WLR 657). This is far more than is required for a prohibitory injunction to which the *American Cynamid* principles apply.

The relevant passage referred to by His Lordship in *Shepherd Homes Ltd v. Sandham (supra)* is from the judgment of Megarry J which is as follows:

> In a normal case the court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.

In my view, in exercising the discretion whether or not to grant the relief, the issue before this court revolves mainly on the legality of the defendant's action in cutting off the water supply to the plaintiffs' premises. As contended by the defendant, the supply of water forms part and parcel of the maintenance services envisaged in cl. 16 of the agreement which in their view is included as one of the services to be provided by them to which the plaintiff must contribute to the cost of providing those services. Having perused cl. 16 of the agreement and taking into account the agreement as a whole in particular cl. 17 which deals with the provision of water, electricity, gas piping and telephone, I am of the view that although cl. 16 is worded in such a way as to be non-exclusive as regards the services to be provided by the defendant, the supply of water is certainly not intended to come within that clause. I have come to this conclusion after a close scrutiny of the said two clauses and the supporting documents exhibited in the plaintiffs' affidavit in particular exhs. KPP4, KPP9 and KPP10 of encl. 3. The plaintiffs has therefore shown an unusually strong and clear case against the defendant in so far the issue of water supply and the respective obligations of the parties in respect of it. The dispute between the parties is regarding maintenance services and in my view as water supply does not come under the category of services as envisaged by cl. 16 of the agreement, there is no legitimate reason for the defendant to take it up as an issue and force it on the plaintiffs.

In exercising its discretion to grant an interlocutory mandatory injunction, this court must also place other considerations as to the hardships caused to the parties and the nature of the injury and inconvenience which will be caused to the applicant if he does not obtain the relief. It is incumbent upon this court to consider how the interest of the parties may best be protected, bearing in mind both the position of the parties subsequently at the formal hearing and also questions of hardship and inconvenience in the meantime, and will take into account any other relevant considerations which may arise. One of these consideration will be the degree of probability with which it appears to be established that the applicant will ultimately succeed at the final hearing. The stronger the case of the applicant that the matters complained of are unlawful, the more likely it is that it will be found to be just and equitable that his interest be protected by the immediate issue of an injunction. Thus in *Bank Islam Malaysia Bhd v. Tinta Press Sdn Bhd & Ors* [1986] 1 MLJ 256, Zakaria Yatim J in referring to the case of *Gibb & Co. v. Malaysia Building Society Bhd* [1982] 1 MLJ 271 said at p. 257 the following:

> The criteria for granting interlocutory mandatory injunction before trial have been laid down by the Federal Court in *Gibb & Co. v. Malaysia Building Society Bhd* [1982] 1 MLJ 271. In that case the court said:
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> > ... The case however must be unusually sharp and clear ... and the court must feel a high degree of assurance that at the trial a similar injunction would probably be granted but we should observe that questions of degree are involved which depend *inter alia* upon considerations of hardship to the parties ... The stronger the case of the applicant that the matters complained of are unlawful, the more likely it is that it will be found to be just and equitable that his interests be protected by the immediate issue of an injunction ... Other matters of particular importance are, on the one hand, the ease or difficulty with which there can be compliance with a mandatory order and the extent of hardship which compliance will cause the respondent and, on the other hand, the nature of the injury and inconvenience which will be caused to the applicant if he does not obtain protection at once ... If there is plainly no defence to the action, and the only object in raising a defence is delay, an injunction should issue even if it gives the applicant his whole remedy before the trial.

In my view the plaintiffs has demonstrated to this court an unusually sharp and clear case in so far as their entitlement to the supply of water to their respective premises and I also found that the act complained of is unlawful and must be restrained. The hardship endured by the plaintiffs and the inconvenience caused to them far outweigh the difficulty of the defendant in

complying with the mandatory order of restoring the water supply to the plaintiffs. In my considered view, the risk of injustice caused to the plaintiffs is far greater if their application is refused and to this effect this court is prepared to consider their application even if this court does not feel a high degree of assurance about their chances in establishing their rights. In this context, I find support in a passage from the judgment in *Bandaraya Development Bhd v. Ang Yoke Lin Construction Sdn Bhd* [1993] 2 CLJ 53 which says:

> If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiffs' chances of establishing his rights, there cannot be any rational basis for withholding the injunction.

Echoing a similar view, Zakaria Yatim J too in *H & R Johnson (Malaysia) Bhd v. H & R Johnson Tiles Ltd & Anor* [1995] 2 CLJ 581 in referring to the English Court of Appeals case of *Leisure Data v. Bell* [1988] FSR 367, said:

> Mandatory injunction more drastic in its effect than prohibitory injunction. The case had to be unusually strong and clear before mandatory injunction be granted at the interlocutory stage. The court of appeal decided where the practical reality of a situation was such it was necessary for some form of mandatory order to be made in the interim, the court would make the order whether or not the high standard of a probability of success at trial was made out.

Such is the approach taken by the courts of this country in exercising its discretion whether or not to grant an interlocutory mandatory injunction. As Justice Abdul Malik Ishak J puts it in *Shamsudin Shaik Jamaludin v. Kenwood Electronics Technologies (M) Sdn Bhd* [1999] 8 CLJ 544, the court will not wring its hand and shirk from its duty under the law when it becomes necessary to order a mandatory injunction notwithstanding the fact that such an action has to be made ad interim and notwithstanding the fact that the high degree of probability of success at the trial has not been made out.

I now consider the case of the defendant who has put up a number of issues in opposing this application. It was contended that the failure of the plaintiffs to name the co-owners of the houses as plaintiffs and the failure to include and name the Lembaga Air Perak as a party to this application is fatal to the plaintiffs' case. No doubt that in the case of some of the plaintiffs, there are co-owners to the said houses but I found no merit whatsoever in this argument and suffice for me to say that the non-inclusion of the abovementioned parties

does not in any way affect the rights of the plaintiffs to maintain this action and furthermore, Lembaga Air Perak is certainly an irrelevant party to the dispute between the parties. Learned counsel for the defendant was too preoccupied with the *American Cynamid* test which at the outset of this judgment I have already reiterated as inappropriate in the instant case. As such the issue of whether damages is an adequate remedy and the sufficiency of the plaintiffs' undertaking ought not be a determining factor in the granting of the plaintiffs' application. On the issue of delay on the part of the plaintiffs in filing the action, if at all there is a delay in this case, the plaintiffs has through their averments in paras. 24-30 of encl. 3 sufficiently explained the reasons for such delay and upon perusing those facts this court finds them to be reasonable. The parties were clearly negotiating over the matter in their efforts to settle the dispute and this takes time. For that reason the plaintiffs has taken some time before finally deciding to go on with their action. In any event mere unreasonable delay is not in itself sufficient to lead to a refusal of relief, there must be a further consideration, such as prejudicing of the position of the defendant by reason of the delay in question, so that it becomes 'practically unjust' to grant the remedy that is sought. (*Equitable Remedies*, 4th edn, p. 480).

Finally as stated by Abdoolcader J in *Wah Loong (Jelapang) Tin Mine Sdn Bhd v. Chia Ngan Yiok* [1975] 2 MLJ 109 at p. 111:

> ... a plaintiff is not entitled to an interlocutory injunction simply because he shows that *prima facie* he has a right and shows an arguable case that the defendant has infringed that right. The whole case should be looked at and the remedy by interlocutory injunction should be left flexible and discretionary ... a plaintiff has to prove, first a strong *prima facie* claim to his right or rights, and secondly an arguable case that the defendant has impugned that right or is about to impugn it. Thirdly, Lord Denning MR said:
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> > In considering whether to grant an interlocutory injunction, the right course of a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done.
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> Megaw LJ, said:
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> > Each case must be decided on a basis of fairness, justice and common sense in relation to the whole issues of fact and law which are relevant to the particular case.

On those authorities, I find that the plaintiffs have shown a strong and clear claims to their rights and that the defendant has infringed that right. The court has also considered the strength of the defence and upon consideration of all those relevant factors order that the injunction sought for by the plaintiffs be granted.

I accordingly allowed the application with costs.